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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 McGHEE DUCLOS, CDCR #F-55976,) Case No. 07-CV-1805-W (JMA)
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13 Plaintiff,) **REPORT AND RECOMMENDATION RE**
14 v.) **GRANTING OF DEFENDANTS' MOTION**
15 JESUS RAMIREZ, et al.) **TO DISMISS PLAINTIFF'S**
16 Defendants.) **COMPLAINT**
17) **[Doc. No. 11]**
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18 This matter comes before the Court on Defendants' Motion to
19 Dismiss Plaintiff's Complaint, brought pursuant to Fed. R. Civ.
20 P. 12(b)(6) and pursuant to the unenumerated provisions of Fed.
21 R. Civ. P. 12(b). Plaintiff has not filed an opposition to
22 Defendants' motion. The Court found the motion suitable for
23 submission without oral argument pursuant to Civil Local Rule 7.1
24 d.1. For the reasons set forth below, the Court recommends that
25 Defendants' motion be **GRANTED**.

26 **I. FACTUAL ALLEGATIONS**

27 On March 6, 2007, Plaintiff was being transported in a state
28 vehicle from R.J. Donovan Correctional Facility ("Donovan") to

1 Alvarado Medical Center. Compl. at 3.¹ Defendants Jesus Ramirez
2 and Leslie Mason ("Defendants"), both Correctional Officers, were
3 the transporting officers. Id. Plaintiff was seated in the
4 backseat and was handcuffed and shackled with security chains.
5 Id. Plaintiff alleges that Defendants failed to attach his seat
6 belt. Id. While stopped at the intersection on westbound Otay
7 Mesa Road and State Route 905, the state vehicle was rear-ended
8 by a vehicle driven by a "John Doe" defendant. Id. The impact
9 caused Plaintiff to be hurled forward into the security partition
10 that separates the officers in the front seat from the inmates in
11 the backseat. Id. Plaintiff suffered a grand mal seizure and
12 lost consciousness. Id. Plaintiff, as well as Defendants, were
13 transported by ambulance to Scripps Mercy Hospital. Id.
14 Plaintiff was diagnosed with blunt head trauma. Id. Plaintiff
15 alleges that his head hit the partition because he was not
16 wearing a seat belt at the time of the collision. Id. at 5.
17 Plaintiff contends that his injuries would not have been as
18 severe had he been wearing a seat belt. Id.

19 Plaintiff alleges two causes of action: First, that
20 Defendants violated his right to be free from cruel and unusual
21 punishment under the Eighth Amendment; and second, that the "John
22 Doe" defendant violated his right to be free from injury by his
23 negligence. Id. at 4. Plaintiff seeks damages in the amount of
24 \$400,000, consisting of \$100,000 each from Defendants, and
25 \$200,000 from the "John Doe" defendant. Id. at 8.

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28 ¹The page number references used by the Court herein refer to the numbers printed by the Court's docketing system, located at the top of each page.

II. DEFENDANTS' MOTION TO DISMISS

As an initial matter, the Court recommends that Defendants' motion to dismiss be granted based on Plaintiff's failure to file an opposition as required by Civil Local Rule 7.1. Civil Local Rule 7.1 f.3.c expressly warns that the failure to file opposition papers may constitute a consent to the granting of a motion. The Ninth Circuit has held that the failure to follow a district court's local rules is a proper ground for dismissal. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).

Accordingly, the Court recommends that the motion to dismiss be **GRANTED** on the basis of non-opposition. The Court further recommends that the motion to dismiss be granted on the additional grounds discussed below.

A. Fed. R. Civ. P. 12(b)(6) Motion: Failure to State a Claim Upon Which Relief Can Be Granted

Defendants seek dismissal of Plaintiff's Complaint on the grounds that Plaintiff has failed to state a cognizable Eighth Amendment claim. Defs.' Mem. at 4.

1. Legal Standards

a. Motion to Dismiss

A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the claims in the complaint. A claim can only be dismissed if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The court must accept as true all material allegations in the complaint, as well as reasonable

1 inferences to be drawn from them, and must construe the complaint
2 in the light most favorable to the plaintiff. N.L. Indus., Inc.
3 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Parks Sch. of Bus.,
4 Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

5 The court looks not at whether the plaintiff will
6 "ultimately prevail but whether the claimant is entitled to offer
7 evidence to support the claims." Scheuer v. Rhodes, 416 U.S.
8 232, 236 (1974). Unless it appears beyond a doubt that the
9 plaintiff can prove no set of facts in support of his claim, a
10 complaint cannot be dismissed without leave to amend. Conley,
11 355 U.S. at 45-46; see also Lopez v. Smith, 203 F.3d 1122, 1129-
12 30 (9th Cir. 2000).

13 Where a plaintiff appears pro se, the court must construe
14 the pleadings liberally and afford the plaintiff any benefit of
15 the doubt. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d
16 621, 623 (9th Cir. 1988). The rule of liberal construction is
17 "particularly important in civil rights cases." Ferdik v.
18 Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992); Noll v. Carlson,
19 809 F.2d 1446, 1448 (9th Cir. 1987) ("Presumably unskilled in the
20 law, the pro se litigant is far more prone to making errors in
21 pleading than the person who benefits from the representation of
22 counsel."). In giving liberal interpretation to a pro se civil
23 rights complaint, however, a court may not "supply essential
24 elements of the claim that were not initially pled." Ivey v. Bd.
25 of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir.
26 1982). "Vague and conclusory allegations of official
27 participation in civil rights violations are not sufficient to
28 withstand a motion to dismiss." Id.; see also Jones v. Cmty.

1 Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984). "The
2 plaintiff must allege with at least some degree of particularity
3 overt acts which defendants engaged in that support the
4 plaintiff's claim." Jones, 733 F.2d at 649 (internal quotation
5 omitted).

6 **b. Eighth Amendment Claim**

7 "[T]he treatment a prisoner receives in prison and the
8 conditions under which he is confined are subject to scrutiny
9 under the Eighth Amendment." Farmer v. Brennan, 511 U.S. 825,
10 832 (1994) (citation omitted). The Eighth Amendment imposes
11 duties on prison officials to, *inter alia*, take reasonable
12 measures to guarantee the safety of the inmates. Id. (citations
13 and quotations omitted). "It is not, however, every injury
14 suffered by one prisoner at the hands of another that translates
15 into constitutional liability for prison officials responsible
16 for the victim's safety." Id. at 834. A prison official must
17 act with "deliberate indifference" to a substantial risk of
18 serious harm to an inmate in order to violate the Eighth
19 Amendment. Id. at 828, 834.

20 "Deliberate indifference is a high legal standard." Toquchi
21 v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). "Deliberate
22 indifference" requires that a prison official's alleged act or
23 omission be accompanied by knowledge of a significant risk of
24 harm; a prison official's failure to alleviate a significant risk
25 that he should have perceived but did not is insufficient for
26 Eighth Amendment liability. Farmer, 511 U.S. at 837-38. Rather,
27 the prison official must "be aware of facts from which the
28 inference could be drawn that a substantial risk of serious harm

1 exists," and "must also draw the inference." Toguchi, 391 F.3d
2 at 1057 (citing Farmer, 511 U.S. at 837). "Eighth Amendment
3 liability requires 'more than ordinary lack of due care for the
4 prisoner's interests or safety.'" Id. at 835 (citing Whitley v.
5 Albers, 475 U.S. 312, 319 (1986)).

6 2. Discussion

7 Plaintiff alleges that Defendants acted negligently when
8 they failed to fasten his seat belt. See Compl. at 3 ("Cruel and
9 Unusual Punishment [] [w]hich resulted from defendants' negli-
10 gence") and 5 ("Had not the defendants been negligent . . .").
11 Deliberate indifference, however, "describes a state of mind more
12 blameworthy than negligence." Farmer, 511 U.S. at 835 (citing
13 Estelle v. Gamble, 429 U.S. 97, 104 (1976)). Therefore, the
14 allegations in the Complaint cannot support an Eighth Amendment
15 claim. Because the allegations set forth in the Complaint are
16 insufficient to establish that Defendants acted with deliberate
17 indifference, the Court recommends that Defendant's motion to
18 dismiss pursuant to Fed. R. Civ. P. 12(b)(6) be **GRANTED**.

19 B. Fed. R. Civ. P. 12(b) Motion: Failure to Exhaust 20 Administrative Remedies

21 Defendants also seeks dismissal of Plaintiff's Complaint
22 pursuant to the unenumerated provisions of Fed. R. Civ. P. 12(b)
23 on the ground that Plaintiff failed to exhaust his administrative
24 remedies pursuant to 42 U.S.C. § 1997e(a).

25 1. Legal Standards

26 Section 1997e(a) of the Prison Litigation Reform Act
27 ("PLRA") requires prisoners to exhaust available administrative
28 remedies before bringing suit challenging prison conditions under

1 42 U.S.C. § 1983:

2 No action shall be brought with respect to prison
3 conditions under section 1983 of this title, or any
4 other Federal law, by a prisoner confined in any jail,
prison, or other correctional facility until such
administrative remedies as are available are exhausted.

5 42 U.S.C. § 1997e(a). This provision does not impose a pleading
6 requirement, but rather is an affirmative defense under which
7 defendants have the burden of raising and proving the absence of
8 exhaustion. Jones v. Bock, 549 U.S. 199, 212, 216 (2007); Wyatt
9 v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).

10 It is mandatory that a prisoner properly exhaust all avail-
11 able remedies. Woodford v. Ngo, 548 U.S. 81, 85, 93 (2006). A
12 California state inmate exhausts his administrative remedies
13 within the meaning of the PLRA by pursuing administrative appeals
14 through all appropriate and available levels of review. Hazleton
15 v. Alameida, 358 F.Supp.2d 926, 929 (C.D. Cal. 2005). The
16 following four steps are available to California state prisoners:
17 (1) informal resolution, (2) formal written appeal on a CDC 602
18 inmate appeal form, (3) second level appeal to the institution
19 head or designee, and (4) third level appeal to the Director of
20 the California Department of Corrections and Rehabilitation
21 ("CDCR") or designee. See Woodford, 548 U.S. at 85-86; Irvin v.
22 Zamora, 161 F.Supp.2d 1125, 1129 (S.D. Cal. 2001); see also Cal.
23 Code Regs. tit. 15, §§ 3084 *et seq.* "[T]o properly exhaust
24 administrative remedies prisoners must 'complete the administra-
25 tive review process in accordance with the applicable procedural
26 rules,' . . . -rules that are defined . . . by the prison griev-
27 ance process itself." Jones, 549 U.S. at 218 (citing Woodford,
28 548 U.S. at 88).

1 An unenumerated Rule 12(b) motion is the proper means by
 2 which to raise a prisoner's failure to exhaust administrative
 3 remedies. Wyatt, 315 F.3d at 1119. "In deciding a motion to
 4 dismiss for failure to exhaust nonjudicial remedies, the court
 5 may look beyond the pleadings and decide disputed issues of
 6 fact." Id. at 1119-20. The proper remedy when nonexhaustion of
 7 administrative remedies has been established is dismissal of the
 8 claim or claims without prejudice. Id. at 1120.

9 2. Discussion

10 Defendants contend that Plaintiff failed to exhaust his
 11 administrative remedies before bringing suit. Defs.' Mem. at 7.
 12 They note that Plaintiff admits that he did not exhaust his
 13 administrative remedies (see Compl. at 7) and assert that Plain-
 14 tiff's admission is supported by CDCR records. Defs.' Mem. at 7.

15 The Appeals Coordinator at Donovan, E. Franklin, conducted a
 16 search for any inmate appeals filed by Plaintiff from March 6,
 17 2007 forward. Franklin Decl., ¶ 4. The search revealed no
 18 "received or accepted, processed or screened-out" appeals from
 19 Plaintiff. Id., ¶ 6 & Ex. A.² Similarly, M. Vela, a Correc-
 20 tional Counselor II/Appeals Coordinator at the California Men's
 21 Colony, conducted a search of any inmate appeals filed by Plain-
 22 tiff at that facility from March 6, 2007 forward. Vela Decl., ¶
 23 5.³ The search revealed three inmate appeals filed by Plaintiff

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 25 ²"Screened-out appeals" are those appeals which are not properly
 26 or timely submitted. Franklin Decl., ¶ 4. Such appeals are returned
 to the inmate with instructions on how to cure the defects, if
 possible. Id.

27 ³Plaintiff was incarcerated at the California Men's Colony at the
 28 time he filed his Complaint. Compl. at 1. The subject incident
 occurred when Plaintiff was being transported from Donovan (id. at 3),
 and Plaintiff has since been relocated to Donovan. See Doc. 12

1 on July 30, 2007, August 14, 2007, and April 3, 2008, none of
2 which pertain to the subject incident. Id., ¶ 6(a)-(c) & Ex. A.
3 No other appeals were processed or accepted for review from
4 Plaintiff. Id., ¶ 7. Finally, N. Grannis, the Chief of the
5 Inmate Appeals Branch for the CDCR, which receives all inmate
6 appeals submitted to the third formal level of review, directed
7 that a search be conducted at that office of any inmate appeals
8 relating to Plaintiff. Grannis Am. Decl., ¶¶ 6-8. The search
9 revealed no appeals received or accepted from Plaintiff, or any
10 appeals which had been rejected by the Office of the Inmate
11 Appeals Branch. Id., ¶¶ 6-8 & Ex. A.

12 Defendants have met their burden of establishing that
13 Plaintiff did not exhaust his administrative remedies prior to
14 bringing this action. Plaintiff's explanation in his Complaint
15 that he did not seek administrative relief because "the actions
16 of [Defendants] cannot be remedied by departmental policy" and
17 thus it would have been "moot" to file an administrative appeal
18 does not alter this finding. Prisoners must exhaust all avail-
19 able remedies, even where the relief sought, e.g., money damages,
20 cannot be granted by the administrative process. Woodford, 548
21 U.S. at 85 (citing Booth v. Churner, 532 U.S. 731, 734 (2001)).
22 Accordingly, the Court recommends that Defendants' motion to
23 dismiss pursuant to Fed. R. Civ. P. 12(b) be **GRANTED**.

24 **III. CONCLUSION**

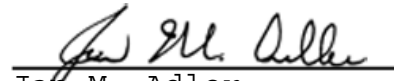
25 For the reasons set forth above, this Court recommends that
26 the District Judge issue an Order **GRANTING** Defendants' motion to
27 dismiss the complaint.

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(consisting of change of address filed by Plaintiff).

1 This report and recommendation will be submitted to the
2 Honorable Thomas J. Whelan, United States District Judge,
3 pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party
4 may file written objections with the Court and serve a copy on
5 all parties on or before **February 27, 2009**. The document should
6 be captioned "Objections to Report and Recommendation." Any
7 reply to the Objections shall be served and filed on or before
8 **March 9, 2009**. The parties are advised that failure to file
9 objections within the specified time may waive the right to
10 appeal the district court's order. Martinez v. Ylst, 951 F.2d
11 1153 (9th Cir. 1991).

12 **IT IS SO ORDERED.**

13 DATED: February 6, 2009

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15 Jan M. Adler
16 U.S. Magistrate Judge
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